



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105**

**Sent via electronic mail**

John Barg and David Metres  
Barg Coffin Lewis & Trapp LLP  
350 California Street, 22nd Floor  
San Francisco, California 94104 -1435

Re: Haystack Mines Site  
Administrative Settlement Agreement and Order on Consent for Removal Action  
CERCLA Docket Nos. 09-2017-02 and 06-02-17

Dear Messrs. Barg and Metres:

This letter conveys the United States Environmental Protection Agency's ("EPA") comments on **Ex. 6 Personal Privacy (PP)** Offer Package ("Package") that Mike Makerov sent on behalf of your client, BNSF Railway, pursuant to the above-referenced Administrative Settlement Agreement and Order on Consent ("ASAOC") on July 11, 2019. As we discussed in a conference call on July 22, 2019, EPA has numerous concerns about the Package and is requiring substantial revisions consistent with the ASAOC and EPA's guidance on relocations. I appreciate that you are taking EPA's concerns seriously and have agreed to resubmit a revised package to EPA and Navajo Nation Environmental Protection Agency to address these concerns as quickly as possible, and no later than August 23, 2019. The relocation of the family is already behind schedule, as BNSF's January 2019 schedule for implementation of specific tasks under the ASAOC indicated that the relocation would occur between March 19 and July 16, 2019.

EPA's concerns are detailed below. I am also enclosing Navajo Nation Department of Justice attorney Harrison Karr's comments on the Package. I recommend that you consult both agencies' comments, the EPA guidance on temporary relocations and the housing agreements between EPA and other Navajo families it has relocated, both of which I sent you last week, in revising the Package. I am also available by phone and email if you would like to discuss any of these issues further.

**1. Costs and Utilities**

Paragraph 32.e. of the ASAOC requires BNSF to "[p]rovide temporary alternative housing to impacted residents . . . and pay for all associated costs." However, BNSF's offer excluded or limited some costs associated with relocation. BNSF's offer letter expressly excluded moving services. The contingency plan for temporary relocation that BNSF proposed is capped at \$3,750, which is unlikely to cover alternative housing and associated costs. BNSF must provide

terms that are consistent with the ASAOC and EPA guidance on temporary relocations, to ensure that residents are “compensated for actual, reasonable, and necessary out-of-pocket expenses.”<sup>1</sup>

BNSF’s offer also places limitations on provision of utilities (tie-ins must be no further in distance away than current tie-ins) and a septic system (limited to “reasonable cost and expense”). *See also* Settlement and Release Agreement ¶ 8 (requiring family to release BNSF from all claims related to lack of or impaired access to water). The relocation cannot occur without utilities and a septic system, as the replacement housing must be, “at a minimum, decent, safe and sanitary.”<sup>2</sup> EPA understands that BNSF is already beginning to communicate with the Navajo Tribal Utility Authority regarding rights of ways for utilities, and that utility companies will not provide service until a residential lease is secured. If, despite BNSF’s best efforts, utilities and a septic system cannot be secured at the currently proposed future home site, alternative arrangements will need to be made to provide the family with alternative housing that is decent, safe and sanitary.<sup>3</sup>

## **2. Temporary relocation**

Paragraph 32.e. of the ASAOC requires “temporary” relocation of the residents, but BNSF’s offer requires the residents to agree to permanently relocate and give up their interest in their current home site. *See, e.g.,* Settlement and Release Agreement ¶ 6. It is premature at best to place use restrictions on the residents’ return to the current home site, as an Environmental Engineering/Cost Analysis must be performed to study potential remedies to be implemented in a later non-time critical removal action. BNSF’s concern that it does not want to relocate the family again if additional work is necessary in a non-time-critical removal action is understandable. The housing agreement examples I sent you address this issue by requiring residents to agree not to return to live at their original home site until the cleanup is complete, acknowledging that it will take many years for the cleanup to be complete.

## **3. Hazardous materials disposal**

The Package states that BNSF will dispose of personal property remaining at the current home site, “excluding any hazardous materials.” This may have been intended to refer to household hazardous waste like paint, but, as currently written, may be broad enough that BNSF could later argue that it includes any radioactive material from the mine site that have might have contaminated the current homes. The intent of the ASAOC is for BNSF to remove such hazardous substances and dispose of any waste appropriately.

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<sup>1</sup> EPA, *Superfund Response Actions: Temporary Relocations Implementation Guidance*, OSWER Directive 9230.0-97 (April 2002) (“Temporary Relocations Guidance”), at 4, available at <https://semspub.epa.gov/work/HQ/174943.pdf>.

<sup>2</sup> Temporary Relocations Guidance at 4.

<sup>3</sup> As we discussed on the conference call, the same holds true if the Bureau of Indian Affairs does not grant the application for a residential lease; alternative arrangements will need to be made for housing. EPA is not aware of any potential cause of action related to the Bureau of Indian Affairs’ approval process, as addressed in Paragraph 9 of the Settlement and Release Agreement.

#### **4. Confidentiality and nondisclosure**

The confidentiality and nondisclosure portion of the Package is inappropriate and unrealistic in this context. The relocation is being carried out under the ASAOC, which is a public document, and, realistically, someone in the area likely could deduce the basic terms of the relocation agreement by observing that the families are receiving new homes around the same time that BNSF is removing soil where their old homes were. Furthermore, the statement that the Agencies shall not disclose the existence or any term of the agreement does not bind the agencies, as we are not party to the agreement and are subject to our own statutory duties under FOIA.

#### **5. Fair and equitable treatment of relocated people**

The first guiding principle of relocations, per EPA's Temporary Relocations Guidance and informed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 regulations at 49 CFR § 24.2, Appendix A, is the fair and equitable treatment of people who are being temporarily relocated.<sup>4</sup> The Settlement and Release Agreement is overbroad and one-sided, and thus risks running afoul of this principle, particularly in the context of a relocation that BNSF is required under the ASAOC to provide.

- a. The Settlement and Release Agreement repeatedly requires the family and their heirs to settle and release any and all claims, known or unknown, against BNSF, including claims related to the current home site, future home site, the Package, the Haystack Mines Site, exposure to radiation, mining operations, deficiencies of their future home site including lack of water, response activities, the Bureau of Indian Affairs lease approval process, and claims under the Comprehensive Environmental Response, Compensation, and Liability Act. Settlement and Release Agreement ¶¶ H, J, 5, 7, 8, 10, 11. These releases are inappropriate, as relocation "is not intended to compensate individuals for expenses or losses associated with contamination at a Superfund site."<sup>5</sup> (Nor does BNSF propose terms that would address such expenses or losses). As such, the proposed releases are inconsistent with the fair and equitable treatment of the family. Furthermore, EPA's relocation agreements at similar mine sites do not include such releases, and EPA's obligations in other residential relocations have extended to some follow-up care, such as builder's or manufacturer's warranties for the homes provided (between ninety days and one year), and inspection and maintenance of access roads after the first few significant weather events to ensure that the road is performing as intended. As we discussed on the call, EPA does not expect BNSF to offer regular maintenance and upkeep, which is the responsibility of the relocated individuals.
- b. To EPA's knowledge, the family does not currently have counsel, despite statements suggesting otherwise in the Settlement and Release Agreement at paragraphs 12, 13, 17, and 25. At a minimum, these statements are misleading and should be removed to be consistent with the fair and equitable principle of relocation. Additionally, Paragraph 1 requires the family to aver that Recitals A through J are true and correct. It would be unrealistic to expect the family to evaluate such proposals without legal advice. As I

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<sup>4</sup> Temporary Relocations Guidance at 4.

<sup>5</sup> Temporary Relocations Guidance at 5.

stated in our conference call, Navajo Department of Justice suggests that BNSF offer to pay for the family to obtain private legal counsel of the family's choice to ensure that the family is fully advised, as well as support BNSF's desire to ensure that any final agreement is enforceable. Navajo Department of Justice's opinions on the Package are not a substitute for counsel retained to represent the family's interests. EPA recommends at a minimum that BNSF remove any proposed provisions that seek releases or concurrence in factual or legal recitals that are beyond the appropriate scope of the relocation agreement.

Thank you for your prompt attention to these matters and your commitment to providing a revised package to EPA and Navajo Environmental Protection Agency as quickly as possible, no later than August 23, 2019. EPA and the Navajo Nation will review the revised package to determine whether it is acceptable before BNSF sends it to the family. If you have any questions or need additional guidance as you revise the Package, please contact me at 415-972-3539 or [gallo.madeline@epa.gov](mailto:gallo.madeline@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Madeline Gallo', with a stylized flourish at the end.

Madeline Gallo  
Assistant Regional Counsel

Encl.

cc: Vivian Craig, Navajo Nation Environmental Protection Agency  
Harrison Karr, Navajo Nation Department of Justice  
Brooke Kuhl, BNSF  
Steve Calanog, EPA

Comments from Navajo Nation Department of Justice, July 15, 2019:

I don't have recommendations for pro bono counsel. It would benefit BNSF to ensure that the family is fully informed regarding the terms of the Settlement and Release Agreement. As such, I would suggest they offer to pay the families to consult with an attorney of their choice.

Letter, page 2: "Electric, water, and septic system, but BNSF's assistance for these utilities is conditioned upon (1) access to approved electrical and water tie-ins at the new home site that are no further in distance away than such tie-ins at the current home site, and (2) a septic system can be installed adjacent to the new home site at reasonable cost and expense ..."

Replacement housing CANNOT be provided without utilities and septic. BNSF should determine in advance whether they are willing to provide utility connections and septic BEFORE asking the residents to accept their package. If BNSF is unwilling to pay for these services at the selected location, they should make another offer that does include them.

Letter, page 3: "Additionally, if either household is required to temporarily relocate as a direct result of removal activities at the Haystack Mines Site before the new home site and mobile homes are ready and available for permanent habitation, BNSF will provide a one-time payment of \$3,750 to that household for temporary relocation expenses."

Temporary relocation expenses cannot be limited in this way in advance. This issue is entirely separate from the permanent location and should not be tied in this way. If temporary relocation is required, BNSF should simply do what it has to do in order to comply with CERCLA, without advance limitations on cost.

Settlement and Release Agreement, page 2: "This Agreement embodies the settlement and release of any and all claims that [Ex. 6 Personal Privacy (PP)] and their heirs have, have had, or may have in the future, individually or collectively, against BNSF related in any way to the Current Home Site, the Future Home Site, the [Ex. 6 Personal Privacy (PP)] Offer Package, and the Haystack Mines Site." This provision, and similar statements elsewhere in the agreement, are simply unacceptable to the Navajo Nation. BNSF is asking the families to release claims that are entirely unrelated to the permanent relocation that they are offering. The released claims could, for example, include health issues related to contamination from the mine site. It is unconscionable for BNSF to ask the residents to release these claims in order to receive benefits that BNSF is REQUIRED to provide them as part of the response action.

The release should be strictly limited to the benefits being provided by BNSF – i.e., a new residence, residence site, and road. Period.

Agreement, page 3 paragraph 5:

This will be a public document as part of a government response action. The requirement of confidentiality is not acceptable. The release is over-broad, as stated above.

Agreement, page 4, paragraph 7: Unconscionably overbroad, as stated above. Unacceptable. Frankly, I'm shocked that BNSF would be so bold as to ask for a release

of claims related to exposure. Such claims have no connection whatsoever to this relocation response action that BNSF is required to perform under CERCLA.

Agreement, pages 4-6, paragraphs 8-12: Unconscionably overbroad and unacceptable, for the reasons stated above.

Agreement, page 7, paragraph 14: As stated above, nondisclosure is unacceptable for a document that is required as part of a CERCLA response action.

Agreement, pages 7-8, paragraphs 15-16: As stated above, nondisclosure and confidentiality are unacceptable.

Agreement, page 8, paragraph 8: Considering how one-sided this agreement is, it is unacceptable to state that “this Agreement shall not be construed for or against any Party based on its participation in drafting this Agreement.” I recommend that BNSF offer to pay the Ex. 6 Personal Privacy (PP) to obtain private legal counsel of their choice to review the agreement (as revised, after comments above are addressed). In addition to ensuring that Ex. 6 Personal Privacy (PP) are fully advised, this will support BNSF’s desire to ensure that any final agreement is actually enforceable.

Agreement, page 10, paragraph 25: As noted above, unless Ex. 6 Personal Privacy (PP) are provided funds to obtain legal counsel and have a realistic opportunity to obtain counsel and to participate meaningfully in negotiations, this paragraph is patently untrue and unreasonable.

This agreement is so unconscionably one-sided that it suggest to me that this would be an excellent site for USEPA to take over responsibility for relocation from the PRP and instead, to require the PRP to pay all relocation costs. For a PRP to include over-reaching provisions such as a full release of claims causes me to question the PRP’s good faith in implementing this portion of the remedy.

I hope you will share this response with BNSF so they understand the Navajo Nation’s concerns on this topic.

Please feel free to contact me to discuss.  
Harrison

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